

Office of the State Appellate Defender
Illinois Criminal Law Digest

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APPEAL

§2-2(b)

In re L.W., 2016 IL App (3d) 160092 (Nos. 3-16-0092 & 3-16-0093, 7/13/16)

To perfect an appeal from a guilty plea and sentence, a defendant must file a notice of appeal within 30 days of the final judgment. In proceedings under the Juvenile Court Act, the dispositional order is the final judgment.

The State filed a petition to revoke defendant's probation and a petition for an adjudication of indirect criminal contempt alleging that defendant had violated his probation. On October 5, 2015, defendant pled guilty to the violation of probation. The court accepted the plea, revoked defendant's probation, and resentenced him to probation. The court also found defendant in indirect criminal contempt and sentenced him to 179 days of detention, but stayed the sentence pending the outcome of defendant's compliance with probation.

On November 30, 2015, the State filed a motion to lift the stay on defendant's contempt sentence. On February 11, 2016, defendant filed a motion to withdraw his plea. The court held that it did not have jurisdiction to address defendant's motion to withdraw. The court granted the State's motion to lift the stay on defendant's sentence, ordered defendant to serve 30 days in custody, but stayed the remaining sentence. Defendant filed a notice of appeal on February 24, 2016.

On appeal, the State argued that the Appellate Court did not have jurisdiction to hear defendant's appeal since the October 5, 2015 order that imposed the contempt sentence was a final and appealable order and defendant never filed a notice of appeal within 30 days of the order.

The Appellate Court rejected the State's argument and held that it had jurisdiction to address defendant's appeal. The instant appeal arose from the contempt proceeding and that judgment was not final and appealable until the penalty was imposed. But the trial court stayed the contempt penalty and retained jurisdiction to ensure that defendant would comply with the terms of his probation. When defendant failed to comply, the trial court enforced its judgment on February 11 by lifting the stay. At that point, the trial court's order became final and appealable. Defendant timely filed his notice of appeal on February 24, less than 30 days after the final judgment.

(Defendant was represented by Assistant Defender Brian Kohut, Ottawa.)

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§2-4(a)

People v. Wade, 2016 IL App (3d) 150417 (No. 3-15-0417, 7/28/16)

1. The imposition of a fine is a judicial act. Because the circuit clerk lacks authority to levy fines, any fines imposed by the clerk are void at their inception. The court concluded that **People v. Castleberry**, 2015 IL 116916, does not preclude the defendant from challenging, as void, fines which were imposed by the circuit clerk.

Castleberry abolished the “void sentence rule” on the ground that the circuit courts are granted general jurisdiction by the constitution and do not derive their authority from statute. Because the circuit clerk is a nonjudicial officer and has no jurisdiction to sentence criminal defendants, **Castleberry** does not apply to the unauthorized imposition of fines by a circuit clerk. The court vacated the fines and fees and remanded the cause with directions to the trial court to impose each proper fine, fee, assessment and court costs.

2. In a partial concurrence and partial dissent, Justice Schmidt found that the majority should not have remanded the cause for reimposition of the vacated fines. Fines are part of a criminal sentence. In **Castleberry**, the Supreme Court held that the Appellate Court may not increase a sentence on appeal, even if the sentence is illegally low. Under **Castleberry**, the only recourse to correct an illegally low sentence is for the State to seek a writ of *mandamus*.

Thus, Justice Schmidt would conclude that the fines imposed by the circuit clerk should be vacated without remand.

(Defendant was represented by Assistant Defender Andrew Boyd, Ottawa.)

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COLLATERAL REMEDIES

§9-1(j)(2)

People v. Mason, 2016 IL App (4th) 140517 (No. 4-14-0517, 7/18/16)

Under Supreme Court Rule 651(c), post-conviction counsel must file a certificate indicating he has: (1) consulted with defendant to ascertain his constitutional issues; (2) examined the record of the trial proceedings; and (3) made any amendments to the petition necessary to adequately present defendant’s claims.

Under Rule 604(d), guilty plea counsel must file a certificate stating that he has: (1) consulted with defendant to ascertain his issues about the guilty plea or sentence;

(2) examined the trial court file and both the report of proceedings of the guilty plea and the sentencing hearing; and (3) made any amendments to the motion to withdraw or reduce sentence to adequately present defendant claims.

Here post-conviction counsel filed a certificate under Rule 604(d) instead of Rule 651(c). The certificate stated that counsel had reviewed defendant's *pro se* motion, consulted with defendant to ascertain his contentions of error in the plea and sentencing hearings, and determined that no amendments to the motion were necessary to present defendant's contentions of error in the plea and sentencing proceedings.

The court held that counsel failed to comply with Rule 651(c) since there are noticeable differences between the two rules. Rule 604(d) only requires counsel to consult with defendant and review the records of the plea and sentencing proceedings. By contrast, Rule 651(c) requires counsel to consult with defendant regarding any constitutional issues and review the record of proceedings. Rule 604(d) is thus more limited in scope than Rule 651(c).

Here post-conviction counsel did not merely mislabel the certificate but used language in the body of the certificate that mirrored the precise language of Rule 604(d). Although the claims in the *pro se* petition mostly involved defendant's guilty plea and sentencing, some claims required counsel to consider records from other proceedings. Thus the certificate failed to show that counsel reviewed the transcripts of all the trial court proceedings or consulted with defendant about issues relating to matters outside the plea and sentencing hearing.

The court remanded the case for further post-conviction proceedings and the appointment of new counsel.

(Defendant was represented by Assistant Defender Daaron Kimmel, Springfield.)

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§9-1(j)(2)

People v. Thompson, 2016 IL App (3d) 150644 (No. 3-15-0644, 7/27/16)

1. A post-conviction petitioner is entitled to a reasonable level of assistance from post-conviction counsel. Supreme Court Rule 651(c) requires counsel to consult with the petitioner to ascertain his contentions of constitutional deprivation, examine the record of the proceeding of the original trial, and make any amendments to the *pro se* petition necessary to adequately present the petitioner's constitutional concerns. Rule 651(c) also requires that counsel submit a certificate indicating that he or she has complied with the requirements of the Rule.

Where post-conviction counsel files a Rule 651(c) certificate, he or she is presumed to have provided reasonable assistance of counsel. However, that presumption may be rebutted by the record. Here, the record rebutted the presumption where the post-conviction petition alleged that defendant was unfit to waive his constitutional right to counsel at trial because he had been diagnosed with schizophrenia and institutionalized twice, but counsel did not obtain the relevant mental health records to support the claim.

2. To provide reasonable assistance, counsel has a minimum obligation to attempt to obtain evidentiary support for the claims raised by the petition. Here, defendant identified the relevant mental health records, some of which had been produced for the trial court by previous counsel. Instead of attempting to obtain the records, post-conviction counsel elected to stand on the *pro se* petition. Because the petition was not supported by evidence, the trial court had no choice but to dismiss it without an evidentiary hearing.

The court rejected the State's argument that counsel must have reviewed mental health records that had been in the possession of former post-conviction counsel. "The question presented in this appeal is not whether defendant's former attorney possessed the . . . records, but whether defendant's current post-conviction counsel reviewed the records."

The order dismissing the post-conviction petition was reversed and the cause remanded for counsel to complete the duties required by Rule 651(c), including obtaining and reviewing defendant's pre-trial mental health records and amending the petition as necessary.

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CONFESSIONS

§§10-3(c), 10-4(a)

In re S.W.N., 2016 IL App (3d) 160080 (No. 3-16-0080, 7/13/16)

1. A police officer, who was a certified juvenile officer, went to defendant's home to question him about a sexual assault. The officer asked defendant's mother if he could question defendant, who was a high school student, at the police station. The mother agreed and declined the officer's invitation to accompany them. At the station, the officer repeatedly told defendant that he was not under arrest. He also gave defendant **Miranda** warnings, but did not take any special steps to make them easier for a juvenile to understand. The interrogation lasted about 43 minutes before defendant made inculpatory statements.

A State's expert testified that defendant suffered from some degree of intellectual impairment and offered no opinion about whether defendant would have been able to understand the **Miranda** warnings. Four defense witnesses who knew defendant from school and were either teachers or experts in various fields related to education or psychology testified that defendant had some degree of intellectual impairment and would not have been able to knowingly and intelligently waive his **Miranda** rights.

The Appellate Court held that (1) defendant was in custody and (2) did not knowingly and intelligently waive his rights.

2. A defendant is in custody for **Miranda** purposes if a reasonable person in defendant's position would not have felt at liberty to terminate the interrogation and leave. The following factors are considered in deciding whether a defendant is in custody: (1) location, time, length, mood, and mode of questioning; (2) number of officers present; (3) presence of family or friends; (4) any indicia of a formal arrest procedure; (5) how defendant arrived at the interrogation site; (6) whether defendant received **Miranda** warnings; and (7) age, intelligence, and mental makeup of the defendant. The reasonable person standard must take into account the age and intellectual capabilities of the defendant.

The court found that a reasonable person of defendant's age and mental capabilities would not have felt free to terminate the interrogation in this case and thus defendant was in custody. Although the officer repeatedly told defendant that he was free to leave at any time, that is only one factor in the analysis. The interrogation took place in a small room at the police station. The substance and mode of questioning indicated to defendant that he was the only suspect. There were no formal indicia of arrest such as booking or fingerprinting, but the officer gave defendant **Miranda** warning which can in themselves be an indicator of custody. There was no concerned adult present. And defendant's limited mental capabilities indicate that he would not have felt free to leave.

3. To validly waive **Miranda** rights, the defendant must fully understand the rights being waived and the consequences of doing so. Special care must be taken when a juvenile or a defendant with cognitive impairments waives **Miranda** rights.

The court found that the evidence overwhelmingly showed that defendant did not knowingly and intelligently waive his rights. It was undisputed that defendant suffered from limited intellectual abilities. The officer delivered the warnings in the same manner he would to an adult of average intelligence and provided very little explanation about what the rights entailed. And each of defendant's four witnesses testified that he was either unable to understand his rights or unable to understand what a waiver entailed.

The court vacated the adjudication of delinquency, suppressed defendant's statements, and remanded for further proceedings.

(Defendant was represented by Assistant Defender Jay Wiegman, Ottawa.)

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COUNSEL

§13-4(b)(4)

People v. Zambrano, 2016 IL App (3d) 140178 (No. 3-14-0178, 7/20/16)

The jury instruction on the testimony of accomplice witnesses states that when a witness says he was involved in the commission of a crime with defendant, his testimony is "subject to suspicion and should be considered by you with caution." Illinois Pattern Jury Instructions, No. 3.17. This instruction should be given when there is probable cause to believe that the witness, not the defendant, was responsible for the crime as a principle or an accessory under an accountability theory, even where the witness denies being involved in the crime.

Although trial counsel attacked the believability of the witness, he never submitted an accomplice witness instruction. The court held that this failure constituted ineffective assistance.

The evidence showed that the witness was so involved in the offense that, despite his denials, there was probable cause to believe that he acted as an accomplice. Additionally, the State granted the witness use immunity before he testified, further supporting the idea that he acted as an accomplice. Under these circumstances, the court could ascertain no viable strategy for counsel's failure to submit the instruction. The failure to do so constituted deficient performance.

The witness's testimony was detrimental to defendant because it created the inference that defendant was either the shooter or acted in concert with the shooter. His testimony was sufficient by itself to convict defendant. Counsel's failure to submit the instruction prejudiced defendant by depriving the jury of critical information it needed to evaluate the testimony.

The court reversed defendant's conviction and remanded for a new trial.

(Defendant was represented by Assistant Defender Mario Kladis, Chicago.)

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EVIDENCE

§19-23(b)

People v. Burhans, 2016 IL App (3d) 140462 (No. 3-14-0462, 7/27/16)

To lay a foundation for expert testimony the proponent must show that the facts or data the expert relies upon are reasonably relied upon by experts in that particular field. Experts may rely upon information and opinions obtained from reading “standard publications” on which their opinion is based.

Here the State’s expert testified that “numerous research studies” supported her opinion, but never identified these studies or testified that the general consensus of experts in the field recognized these studies. The court held that the State failed to lay an adequate foundation for these studies. While an expert does not need to name the publications on which she relies, the expert must show that the general consensus of the expert community recognizes the validity of the publications. Here the State did neither.

The court, however, affirmed defendant’s convictions since the State’s other evidence overwhelmingly supported his conviction and made any error harmless.

(Defendant was represented by Assistant Defender Editha Rosario-Moore, Ottawa.)

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§19-27(h)

People v. Perez, 2016 IL App (3d) 130784 (No. 3-13-0784, 7/21/16)

Under 725 ILCS 5/116-3, a defendant may make a motion in the trial court for forensic DNA testing. To prevail on the motion, the defendant must present a *prima facie* case that identity was the issue at trial and the evidence has been subject to a chain of custody. If the defendant makes a *prima facie* case, the court shall allow testing where it has “the scientific potential to produce new, non-cumulative evidence materially relevant to the defendant’s assertion of actual innocence even though the results may not completely exonerate the defendant.”

Here defendant was convicted of predatory criminal sexual assault. After trial he filed a motion for forensic testing on blood and hair found on two pairs of the victim’s underwear. The trial court denied the motion. The Appellate Court reversed the trial court and held that defendant was entitled to forensic testing.

First, defendant made a *prima facie* case that identity was at issue in his trial. During trial, defendant questioned the physical evidence linking him to the offense and the credibility of the victim. The court held that the question of whether identity was an issue was unrelated to the strength of the State's evidence. Defendant's denial at trial that he committed the offense is enough to place identity in issue. The court also held that identity may be placed in issue even if defendant does not testify.

Defendant also made a *prima facie* showing that there was a sufficient chain of custody since the evidence has remained in the State's control since trial. Even though a number of people handled the evidence before it was turned over to the police, the chain of custody requirement does not apply to evidence before it is taken into custody.

Finally, the tests have the potential to produce new, non-cumulative material evidence relevant to Defendant's actual innocence. A result that did not match defendant or the victim would be quite relevant since it would be antithetical to the State's theory that defendant alone assaulted the victim.

(Defendant was represented by Assistant Defender Pat Cassidy, Chicago.)

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JURY

§32-8(j)

People v. Zambrano, 2016 IL App (3d) 140178 (No. 3-14-0178, 7/20/16)

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The evidence showed that the witness was so involved in the offense that, despite his denials, there was probable cause to believe that he acted as an accomplice. Additionally, the State granted the witness use immunity before he testified, further supporting the idea that he acted as an accomplice. Under these circumstances, the court

could ascertain no viable strategy for counsel's failure to submit the instruction. The failure to do so constituted deficient performance.

The witness's testimony was detrimental to defendant because it created the inference that defendant was either the shooter or acted in concert with the shooter. His testimony was sufficient by itself to convict defendant. Counsel's failure to submit the instruction prejudiced defendant by depriving the jury of critical information it needed to evaluate the testimony.

The court reversed defendant's conviction and remanded for a new trial.

(Defendant was represented by Assistant Defender Mario Kladis, Chicago.)

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SENTENCING

§§45-7(b), 45-13

People v. Wade, 2016 IL App (3d) 150417 (No. 3-15-0417, 7/28/16)

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Castleberry abolished the "void sentence rule" on the ground that the circuit courts are granted general jurisdiction by the constitution and do not derive their authority from statute. Because the circuit clerk is a nonjudicial officer and has no jurisdiction to sentence criminal defendants, **Castleberry** does not apply to the unauthorized imposition of fines by a circuit clerk. The court vacated the fines and fees and remanded the cause with directions to the trial court to impose each proper fine, fee, assessment and court costs.

2. In a partial concurrence and partial dissent, Justice Schmidt found that the majority should not have remanded the cause for reimposition of the vacated fines. Fines are part of a criminal sentence. In **Castleberry**, the Supreme Court held that the Appellate Court may not increase a sentence on appeal, even if the sentence is illegally low. Under **Castleberry**, the only recourse to correct an illegally low sentence is for the State to seek a writ of *mandamus*.

Thus, Justice Schmidt would conclude that the fines imposed by the circuit clerk should be vacated without remand.

(Defendant was represented by Assistant Defender Andrew Boyd, Ottawa.)

STATUTES

§48-1

[People v. Geiler](#), 2016 IL 119095 (No. 119095, 7/8/16)

The mandatory/directory distinction involves the question of whether the failure to comply with a particular procedural step will or will not invalidate a governmental action. Courts presume that procedural commands to government officials are directory. The presumption is overcome and a provision becomes mandatory only if: (1) negative language in the statute or rule prohibits further action where there is noncompliance; or (2) the right the statute or rule protects would generally be injured by a directory reading.

Illinois Supreme Court Rule 552 governs the processing of traffic citations and imposes an obligation on the arresting officer to transmit specific portions of the ticket to the circuit court within 48 hours after the arrest. Here the arresting officer gave defendant a speeding ticket on May 5 but did not transmit the ticket to the circuit court until May 9, clearly beyond the 48 hour time limit. There was no dispute that Rule 552 was violated; the only issue was the appropriate consequences for the violation.

Rule 552 merely provides that the arresting officer shall transmit the ticket to the circuit court within 48 hours. It does not specify any consequences for the violation or contain any negative language prohibiting prosecution or further action where there has been noncompliance. Thus the negative language exception does not apply.

Rule 552 is designed to ensure judicial efficiency and uniformity in processing tickets. A directory reading of Rule 552 would not generally injure judicial efficiency or uniformity. In this case, there was no evidence that the delay in transmitting the citations impaired the trial court's management of its docket. There was also no indication that the delay would ordinarily prejudice the rights of a defendant. A defendant's first appearance on a traffic citation must be set within 14 and 60 days after arrest. Thus even if the citation is not transmitted within 48 hours, it may still be filed before defendant's first court appearance and he would be unaffected by the delay.

The court therefore concluded that Rule 552 is directory and no specific consequence is triggered by noncompliance. But a defendant may still be entitled to relief if he can demonstrate that he was prejudiced by the violation.

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TRAFFIC OFFENSES

§50-1

People v. Geiler, 2016 IL 119095 (No. 119095, 7/8/16)

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The court therefore concluded that Rule 552 is directory and no specific consequence is triggered by noncompliance. But a defendant may still be entitled to relief if he can demonstrate that he was prejudiced by the violation.

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§50-2(c)

People v. Taylor, 2016 IL App (2d) 150634 (No. 2-15-0634, 7/20/16)

Under section 11-501.5(a) of the Illinois Vehicle Code, a police officer who has reasonable suspicion to believe that a defendant was driving under the influence of alcohol may request the defendant to provide a breath sample for a preliminary breath screening test. The defendant may refuse to take the test. The results of the preliminary breath screening test may be used to decide whether further blood alcohol tests are required. 625 ILCS 5/11-501.5(a).

The court held that the police officer did not comply with the statute when he stopped defendant and ordered him to take a preliminary breath test. The statute allows the test only if the officer requests and defendant consents to the test, although the consent does not need to be informed. The court held that the preliminary breath test results were properly suppressed and that there was no probable cause to arrest defendant without the test results.

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WITNESSES

§57-6(b)(1)

People v. Evans, 2016 IL App (3d) 140120 (No. 3-14-0120, 7/13/16)

A primary interest of the confrontation clause is the right of cross-examination. Generally, a witness is subject to cross-examination when he takes the stand under oath and willingly answers questions and the opposing party has an opportunity to cross-examine him.

The State called a co-defendant who had already been convicted to testify against defendant. The State gave him use immunity and under these circumstances the State had the right to demand and expect his testimony. Co-defendant took the stand and answered a few preliminary questions. But when the State began asking questions about the circumstances and details of the crime, co-defendant refused to answer any questions. The State continued to ask multiple leading and suggestive questions about the crime, but co-defendant refused to answer them.

The court held that the State's questioning of co-defendant after he refused to answer questions about the crime deprived defendant of his right to confrontation. The State was allowed to establish evidence about the circumstances of the crime through its own leading and suggestive questions, including evidence that inculpated defendant,

but since co-defendant refused to testify, defendant was unable to confront and cross-examine him about these matters.

The court rejected the State's argument that its questions were merely attempts to impeach co-defendant with prior statements. The State failed to lay a proper foundation for using the statements as impeachment and in fact never introduced them into evidence. The court also rejected the State's argument that the questions were merely attempts to refresh co-defendant's recollection. Co-defendant never indicated that his memory was exhausted or that a prior statement would refresh his memory.

The court held that the improper questioning added critical weight to the State's case and since the remaining evidence against defendant was not overwhelming, the error was not harmless beyond a reasonable doubt. The court granted defendant a new trial.

(Defendant was represented by Assistant Defender Dimitri Golfis, Ottawa.)

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